FOR ARGUMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, PETITIONER

v.

HERMAN RADDATZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. For the first time in this litigation, respondent contends (Br. 20-35) that the proceedings in the district court concerning his suppression motion did not comply with the Federal Magistrates Act, 28 U.S.C. 636(b). Respondent recognizes that the Act specifically authorizes a magistrate to conduct a hearing and to make proposed findings of fact and recommendations of law with regard to a "motion * * * to suppress evidence in a criminal case * * *." 28 U.S.C. 636(b)(1)(A) and (B). He nonetheless argues that the district court's duty to make a "de novo determination * * * of the * * * [magistrate's] proposed findings and recommendations" (28 U.S.C. 636(b)(1)(C)) requires the district judge to rehear testimony previously adduced before the magistrate. Although respondent acknowledges that "the term 'de novo determination' does not necessarily require

a rehearing of evidence [in every case]" (Br. 22),[1] he suggests that such a duplication of efforts is required in any case in which there is a conflict in testimony among the witnesses. See Br. 23. This claim is squarely refuted by the language, legislative history and purpose of the Act.[2]

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[1]In light of this concession, respondent's initial discussion of the statutory question (Br. 20-22) is somewhat puzzling. He there appears to suggest that a rehearing is required in every case because "[t]he term 'de novo' has a common and accepted legal meaning" (*id.* at 21). In any event, the cases relied on by respondent involve different statutes with different purposes and histories and are thus inapposite.

For example, in *Agosto* v. *INS*, 436 U.S. 748 (1978), the Court concluded that a "hearing de novo" under Section 106(a)(5)(B) of the Immigration and Naturalization Act, 8 U.S.C. 1105a(a)(5)(B), entailed an evidentiary rehearing in the district court. There is an obvious difference in language between Section 106(a)(5)(B) and the Magistrates Act. In addition, the Court noted in *Agosto* that in enacting Section 106(a)(5)(B), "Congress was aware of our past decisions holding that the Constitution requires that there be some provision for *de novo* judicial determination of claims to American citizenship in deportation proceedings." 436 U.S. at 753. Here, in contrast, the legislative history accompanying the Magistrates Act demonstrates that "[t]he use of the words 'de novo determination' is not intended to require the judge to actually conduct a new hearing on contested issues." H.R. Rep. No. 94-1609, 94th Cong., 2d Sess. 3 (1976). See also *United States* v. *First City National Bank*, 386 U.S. 361, 368 (1967) ("review de novo" construed to mean trial de novo in light of language and legislative history of Bank Merger Act).

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[2]We note that Amicus Chicago Council of Lawyers, which otherwise supports respondent, nonetheless appears to accept that the Act "permits the district judge to assign to a magistrate the evidentiary hearing on a motion to suppress, and to refuse the defendant's request to hold a de novo hearing even when the magistrate's recommended decision depended on the credibility of witnesses" (Br. 4).

Section 636(b)(1)(C) provides that the district court "shall make a de novo determination of the [magistrate's] report" and thereby "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." It is thus apparent that Congress intended the district court to make a thorough evaluation of the magistrate's report and not to hold a de novo hearing of the evidence already heard and evaluated by the magistrate. Indeed, the statute further states that the district court "may also receive further evidence"—a grant of power wholly unnecessary if respondent's construction of "de novo determination" were correct. In sum, "[t]he Magistrates Act * * * [does not] require the district court judge to personally hear the evidence on a motion that has been referred to a magistrate" (Pet. App. 11a). Accord, *Banks* v. *United States*, No. 79-5099 (6th Cir. Jan. 30, 1980), slip op. 4-5; *United States* v. *Marshall*, No. 78-5664 (5th Cir. Jan. 2, 1980), slip op. 2084-2086; *United States* v. *Miller*, 609 F. 2d 336, 339-340 (8th Cir. 1979); *United States* v. *Edwards*, 602 F. 2d 458, 466-467 & n.7 (1st Cir. 1979); *Orand* v. *United States*, 602 F. 2d 207, 208-209 (9th Cir. 1979); *United States* v. *Whitmire*, 595 F. 2d 1303, 1305-1306 & n. 1 (5th Cir. 1979), petition for cert. pending, No. 79-375. Compare 28 U.S.C. 636(d) (district court must "hear the evidence" previously heard by magistrate in contempt proceeding).

Moreover, as we pointed out in our opening brief (pages 26-28), the legislative history unequivocally demonstrates that a "de novo determination" is not a "de novo hearing." Respondent primarily relies (Br. 29-30) on a prepared statement of the Judicial Conference that was placed in the record of a 1975 Senate hearing without congressional comment. See *Jurisdiction of*

United States Magistrates: Hearing on S. 1283 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess. 33-41 (1975).[3] That statement concerned an early version of the 1976 amendment to the Act that required the district courts to "hear de novo" dispositive motions. *Id.* at 33. It is therefore not surprising that the Judicial Conference's explanation indicates that the district judge would be required to conduct a second evidentiary hearing in some circumstances, even though the magistrate had already heard and evaluated the same testimony. *Id.* at 37.

The Judicial Conference's version of the Act was never enacted, however. Instead, Congress purposefully substituted the "de novo determination" requirement that now appears in the statute for the phrase "hear de novo," thereby explicitly rejecting respondent's construction of the Act. See H.R. Rep. No. 94-1609, 94th Cong., 2d Sess. 1 (1976). The legislative history further shows that the phrase "de novo determination" is derived from the Ninth Circuit's decision in *Campbell* v. *United States District Court for the Northern District of California*, 501 F. 2d 196, 206-207 (9th Cir.), cert. denied, 419 U.S. 879 (1974). See H.R. Rep. No. 94-1609, *supra*, at 3-4, 6. In that case, the court of appeals explained that the district court is required to make a "de novo determination" of a suppression motion referred to a magistrate, but "is not required to hear any witness and not required to hold a de novo hearing of the case." 501 F. 2d at 206-207.[4] The House Report accompanying the 1976

[3]The other legislative statements cited by respondent (Br. 30-31) reflect only that the district court has the power to rehear the live testimony if it so chooses.

[4]*Campbell* involved a construction of the original Act.

amendment to the Act quotes from *Campbell* with approval (H.R. Rep. No. 94-1609, *supra*, at 3-4) and emphasizes that "use of the words 'de novo determination' is not intended to require the judge to actually conduct a new hearing on contested issues." *Id.* at 3. See also *id.* at 11; 122 Cong. Rec. 35182-35183 (1976) (remarks of Rep. Railsback).[5]

Furthermore, respondent's construction of Section 636(b)(1)(C) would undermine the clear congressional purpose that informs the Act. Congress created federal magistrates to offset the growing crush of litigation in the district courts. See, *e.g.*, *Mathews* v. *Weber*, 423 U.S. 261, 266-269 (1976); *Wingo* v. *Wedding*, 418 U.S. 461, 463 (1974); S. Rep. No. 371, 90th Cong., 1st Sess. 8-12 (1967). In 1976 and again in 1979, Congress increased the jurisdiction of magistrates "in order to assist the judges of these courts in handling an ever-increasing caseload." H.R. Rep. No. 94-1609, *supra*, at 4. See, *e.g.*, S. Rep. No. 94-625, 94th Cong., 2d Sess. 2-6 (1976); H.R. Rep. No. 96-287, 96th Cong., 1st Sess. 2-5, 19-20 (1979); S. Rep. No. 96-74, 96th Cong., 1st Sess. 1-3 (1979). In particular, Congress sought to delegate pretrial hearings in both civil and criminal cases to magistrates "as a means of freeing time of district court judges to preside at trials of other cases." H.R. Rep. No. 94-1609, *supra*, at 4. Respondent, however, would require the district judge to conduct a second hearing in every case in

[5]As we observed in our opening brief (pages 27-28), Congress has subsequently reiterated its view that "the words 'de novo determination' in subparagraph 636(b)(1)(C) do *not* require the judge to actually conduct a new hearing on contested issues." *Magistrate Act of 1977: Hearings on S. 1612 and S. 1613 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 37 (1977); see S. Rep. No. 96-74, 96th Cong., 1st Sess. 4 (1979); *Hearings on Magistrates Reform Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 167, 257 (1977).

which there is a conflict in testimony, thereby expending the court's resources and the time and energy of lawyers and witnesses. Because many, if not most, pretrial hearings and certainly most suppression hearings involve controverted testimony, the two-hearing requirement proposed by respondent is completely at odds with Congress' express goals.[6]

To be sure, the Act permits the district court to rehear the testimony previously presented before the magistrate. But, as the court of appeals concluded (Pet. App. 13a-14a), the district court did not abuse its broad discretion in not conducting a second, duplicative hearing in this case. The legislative history and purpose discussed above and in our opening brief shows that Congress intended that the district courts would make de novo determinations of substantive motions involving contested issues of fact without personally rehearing the evidence already evaluated by the magistrate. Moreover, in making a de novo determination in this case, the district court was able to rely on various objective factors in the record as well as the magistrate's credibility findings. First, respondent, who has a lengthy criminal record, contended at the hearing that he made no statements at all at the time of his arrest and that the police had threatened to kill him (Tr. 127, 150-153). Respondent adhered to this story despite his counsel's efforts to make him recall his statements or modify his testimony (Tr. 123-130, 149-153), despite the contrary testimony of the arresting officer as corroborated by the contemporaneous police report (*id.* at 4, 14-23, 26-29, 31-32, 153), and

[6]In fact, as a practical matter, a district judge would probably not use a magistrate for any pretrial hearing in which there is likely to be a difference in the witnesses' testimony if he must then rehear that testimony.

despite the fact that the statement made at the time of his arrest is consistent with the January 12 statement that respondent admits making.[7] In addition, respondent admitted at the hearing that he had lied to the agents in November 1976 (Tr. 110, 147). Finally, both federal agents unequivocally denied respondent's claim that he had been promised immunity if he would cooperate (Pet. App. 6a, 41a; A.16-17; Tr. 161, 184-185, 234-236).[8]

[7]The testimony of respondent's girlfriend was equally incredible. She claimed that the agents had offered respondent a lifetime job (Tr. 54, 85-86). Notwithstanding her admissions that she was not present during large parts of the conversations between the agents and respondent and that much of what she was stating was based on her conversations with respondent, she also claimed that she had not discussed the case with respondent and that she had decided on her own to testify (*id.* at 74-81, 88, 91-93, 95-96).

[8]Respondent argues at length (Br. 10-15, 39-42) that the agents' testimony was "in conflict on a number of critical issues." The agents consistently agreed, however, on the only relevant issue in the case: whether they had promised respondent immunity. Furthermore, notwithstanding respondent's claims to the contrary, the agents' testimony is not inconsistent even with regard to the immaterial issues on which respondent focuses.

Thus, respondent suggests (Br. 39) that Agent Russell denied that respondent was an object of the investigation on November 19, whereas Agent McCulloch testified that he was. The transcript pages cited by respondent, however, do not support his characterization of Agent Russell's testimony. Agent Russell stated only that he did not think that respondent had violated 18 U.S.C. 922(h) when he interviewed him on November 19, because respondent claimed that he had taken the gun from Batson in self-defense (Tr. 175-178). Similarly, Agent Russell denied that he specifically told respondent on November 19 that he might be indicted, not that he did not consider respondent to be a subject of the investigation (*id.* at 183-184).

Moreover, respondent erroneously contends (Br. 40) that Agent Russell claimed never to have discussed the question of cooperation with respondent at all, when in fact Agent Russell merely stated that he never talked with respondent about cooperation during the

2. Respondent's constitutional claims are addressed extensively in our opening brief (pages 28-58). We here reply briefly to respondent's analysis of the questions.

a. Respondent's discussion of due process (Br. 42-59) simply ignores the fact that respondent had a full and fair hearing before the magistrate. See *Jackson* v. *Denno*, 378 U.S. 368 (1964). Based on his view of the evidence and the demeanor of the witnesses, the magistrate concluded that the ATF agents were more credible than respondent, and he recommended that the suppression motion be denied (Pet. App. 41a). Had the district court merely deferred to those proposed findings and recommendations at that point and again denied respondent's motion, there is no question that respondent would have received all the process that he is due. That the district court instead thoroughly reviewed the record, including the magistrate's report, the transcript, and the parties' submissions, and then made a de novo determination of respondent's motion cannot possibly have deprived respondent of due process. See, *e.g.*, *Wingo* v. *Wedding*, *supra*, 418 U.S. at 486-487 (Burger,

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period between the November 19 and January 12 meetings (Tr. 161). (Respondent had intimated that he had made phone calls to the agents in that period of time (*id.* at 116, 147, 165, 207).)

The record also does not support respondent's claim that the agent's testimony differed as to the type of cooperation discussed with respondent on November 19. Read in context, it is apparent that Agent McCulloch's testimony about asking respondent to act as an informant referred to the January 12 and 14 meetings and not the meeting of November 19 (Tr. 235-238). Indeed, both agents agreed that the only discussion of cooperation on November 19 concerned their desire to have his aid in tracing the firearm that was in respondent's possession at the time of his arrest, since that firearm belonged to a man who had been murdered (*id.* at 165, 236).

C.J., dissenting); *Mildner* v. *Gulotta*, 405 F. Supp. 182, 195 (E.D.N.Y. 1975) (three-judge court), aff'd mem., 425 U.S. 901 (1976).[9]

b. Respondent also erroneously contends (Br. 47-49) that his cognizable interest in the outcome of the suppression motion is equivalent to the interests implicated at the criminal trial itself. Concomitantly, he argues that the process due at a Fifth Amendment voluntariness hearing is somehow greater than the procedural protections required at a Fourth Amendment suppression hearing. But in *Lego* v. *Twomey*, 404 U.S. 477 (1972), the Court made clear that a voluntariness hearing is concerned with "the method used to extract [confessions]" and is "designed to safeguard the right of an individual, *entirely apart from his guilt or innocence*, not to be compelled to condemn himself by his own utterances." *Id.* at 485 (emphasis supplied). In short, "the purpose that a voluntariness hearing is designed to serve has nothing whatever to do with improving the reliability

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[9]Respondent does not cite or discuss the Court's summary affirmance in *Mildner* v. *Gulotta*, *supra*. In that case, plaintiffs challenged New York's disbarment procedures on due process grounds. The Appellate Division of the New York Supreme Court is responsible for disciplining and disbarring attorneys charged with misconduct. The appellate court does not conduct the evidentiary hearings, however. Instead, it assigns the case to a referee for a formal disciplinary inquiry at which evidence is presented and witnesses testify. The referee, like a magistrate, evaluates the evidence and the demeanor of the witnesses and then submits a report to the Appellate Division. The referee has no power to determine, and the Appellate Division is free to substitute its judgment for the referee's on all questions including credibility. In other words, the court need not defer to the magistrate's findings. See 405 F. Supp. at 190-191. Nonetheless, the three-judge court upheld these statutory procedures, observing that it is not "constitutionally required that the * * * final arbiter of facts have personally heard the accused attorneys or other witnesses or have allowed oral argument upon the motions to confirm or disaffirm the referees' report." *Id.* at 195. This Court summarily affirmed.

of jury verdicts * * *." *Id.* at 486. See *Rogers* v. *Richmond*, 365 U.S. 534, 540-544 (1961).

c. There is also no substance to respondent's claim (Br. 52-53) that the procedure established by the Magistrate's Act is distinguishable from the manner of proceedings uniformly followed by administrative agencies. The magistrate, like an administrative law judge, conducts the evidentiary hearing and makes tentative findings of fact and recommendations of law. Then the district judge, like the agency or commission, makes a thorough review of the record and is thereafter free to "accept, reject, or modify in whole or in part, the findings of fact and recommendations of law. Then the district judge, like the agency or commission, undertakes a thorough review of the record and is thereafter free to "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C. 636(b)(1)(C). The Court long ago approved these kinds of fact-finding procedures (see *e.g.*, *Morgan* v. *United States*, 298 U.S. 468 (1936); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 492-497 (1951)), and there is no reason to reject their use in the pretrial, suppression motion context. Indeed, we further note that the Court routinely uses special masters in deciding cases falling within its original jurisdiction even though the master's reports and recommendations are "advisory only." R. Stern & E. Gressman, *Supreme Court Practice* 624 (5th ed. 1978).[10]

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[10]Respondent states (Br. 53) that "the courts have repeatedly refused to enforce agency orders" when there is no basis for the agency's determination of fact contrary to the finding of the administrative law judge. That observation is correct but irrelevant. Unless the issue is committed solely to agency discretion, the courts must reject any administrative finding that has no basis in fact, regardless of the administrative law judge's determination. Here, however, the district court's decision to deny respondent's motion is based on ample evidence, and the district court agreed with the magistrate.

For the reasons stated above and in our opening brief, the judgment of the court of appeals should be reversed.

WADE H. MCCREE, JR.
Solicitor General

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